

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

FILED  
04 MAR 12 PM 4:23  
U.S. DISTRICT COURT  
N.D. OF ALABAMA

UNITED STATES OF AMERICA,

vs.

RICHARD M. SCRUSHY,

Defendant.

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)  
) Case No. CR-03-BE-530-S  
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**ENTERED**

**MAR 12 2004**

ORDER

On March 10, 2004, this matter came before the court for a conference and hearing on the defendant's motion for discovery (Doc. 97). Based on the discussions, arguments, proffers, and agreement of counsel with respect to this motion, the following orders and notations are ENTERED:

1. HealthSouth general ledger— The first area of dispute between the parties concerned discovery of the HealthSouth Corporation general ledger. The ledger consists of millions of accounting entries maintained since the mid-1980s and currently stored on three UNIX computer tapes. Although the Government has offered to make a copy of the tapes for the defendant, the defendant contends that the computer systems required to access the data on the tapes are cost prohibitive. The Government agrees that it had to spend over \$200,000 to obtain the necessary computer equipment to enable it to access the general ledger data. The defendant seeks an order requiring the Government to allow defendant's counsel to use the Government's existing computer system to access and analyze the general ledger data.

While the court may sympathize with the defendant's reluctance at going to the expense to access and analyze the data, Rule 16 of the Federal Rules of Criminal Procedure simply does not

authorize the court to require the Government to allow the defendant to use the Government's computer equipment to access and analyze digital data. Although the Government is obligated to produce the "raw" data in the form of the computer tapes, it is not required by the rules to assist the defendant in accessing or understanding them. If the Government is satisfied that it has met its obligations under the criminal discovery rule, the court will not go outside of its rule-based authority to make the Government do something the rules do not require. Thus, this aspect of the defendant's motion for discovery is DENIED.

2. Retrieved emails in HealthSouth computer system— Defendant seeks an order to compel the Government to produce all "deleted" emails it has successfully retrieved from HealthSouth's computer system. The Government represented that (1) the computer software it used to retrieve emails thought to have been deleted from the HealthSouth computer network is proprietary and cannot be shared, and (2) to the extent it has actually printed off any retrieved emails, they have been produced to the defendant. The issue is whether the defendant has the capability of capturing or attempting to retrieve "deleted" emails. The parties agreed that their respective computer consultants will meet and attempt to determine a manner by which the defendant can undertake to retrieve "deleted" emails, using publicly available software, in a manner that will match them to the emails retrieved by the Government's system.

3. Examination of original digital and analog recordings— At issue is the defendant's right to have his expert examine several digital and analog recordings for authenticity purposes without endangering the Government's legitimate need to maintain the security of the original recordings. The parties agreed that their respective sound and recording experts will meet and attempt to

determine a protocol under which the defendant's expert will be able to make an effective examination and analysis of the recordings while maintaining the secure integrity of the originals.

4. Defendant's statements in other litigation— Defendant seeks an order to require the Government to produce and make available to the defense all depositions, testimony, and other statements by the defendant in other litigation. Although the Government acknowledges that it has found several such statements, it cannot guarantee that it has found all such statements the defendant may have made over the years in connection with lawsuits and other proceedings. F.R.Crim. P. 16(a)(1)(B) provides in part:

(B) *Defendant's Written or Recorded Statement.* Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) any relevant written or recorded statement by the defendant if:

- the statement is within the government's possession, custody, or control; and
- the attorney for the government knows--or through due diligence could know--that the statement exists....

Certainly, statements made by the defendant in other legal settings and proceedings may be relevant; thus, the issue is whether the written statements are in the Government's possession or control and the Government's counsel knows of the existence of the statements. Given that defendant is seeking production of statements actually tracked down and obtained by the Government, both of these elements are met.

The defendant's motion to require the Government to produce and make available for inspection and copying those statements made by the defendant in other legal settings and proceedings that are actually in the Government's possession is due to be GRANTED. The

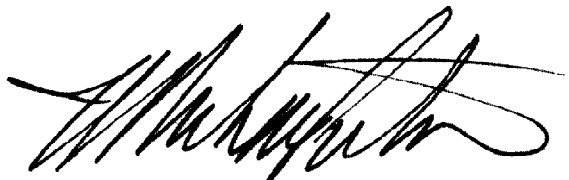
Government is DIRECTED to make the statements available to the defendant within fifteen (15) days.

5. HealthSouth videotapes— The defendant seeks a Rule 17(c) subpoena to require HealthSouth Corporation to produce as evidence all videotapes and other visual recordings of the defendant now in its possession. The request is due to be and hereby is GRANTED, and the Clerk is DIRECTED to issue the attached Rule 17(c) subpoena and to make the same available to counsel for the defendant for service.

6. Redacted 302s— The Government has produced to the defendant a large number of FBI-302s, written memoranda of witness interviews, but has redacted from them the date on which the interview occurred and the name of the FBI agent(s) who authored the 302. The defendant seeks unredacted documents, and Government now agrees that the dates of the interviews reflected in the 302s is important and has agreed to provide 302s without redaction of the dates. The court is persuaded that the names of the agents who conducted each interview and who authored the respective 302s also is an important piece of information, bearing potentially on Brady/Giglio concerns. Although it is true that the names of agents who actually take the witness stand will be revealed under Jencks, the defendant has a legitimate need to explore the credibility of the 302s that purport to report interviews with witnesses and whether the witnesses statements were faithfully and accurately recorded. Consequently, the defendant's motion on this issue is GRANTED, and the Government is DIRECTED to produce for inspection and copying by the defendant, within fifteen (15) days after this Order, all FBI-302s it previously produced, without redaction of the date of the interview and name of the FBI agent authoring the memorandum.

The Clerk is DIRECTED to forward a copy of the foregoing to all counsel of record.

DONE this the 12<sup>th</sup> day of March, 2004.

A handwritten signature in black ink, appearing to read 'T. Michael Putnam', written over a horizontal line.

T. MICHAEL PUTNAM  
UNITED STATES MAGISTRATE JUDGE

# United States District Court

NORTHERN

DISTRICT OF

ALABAMA

UNITED STATES OF AMERICA

V.

## SUBPOENA IN A CRIMINAL CASE

RICHARD M. SCRUSHY

CASE NUMBER: CR-03-BE-0530-S

TO: HealthSouth Corporation  
c/o Custodian of Records  
One HealthSouth Parkway  
Birmingham, Alabama 35243

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE

COURTROOM

Thomas, Means, Gillis & Seay, P.C.  
505 20th Street North  
Suite 1035  
Birmingham, Alabama 35202

DATE AND TIME

March 22, 2004

☐ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

All video and audio tapes maintained in the HealthSouth video library or in other offices of the company that relate to the time period from 1984 to March 18, 2003, including finished presentations, outtakes, "B rolls," and edited portions or segments.

U.S. MAGISTRATE JUDGE OR CLERK OF COURT

*Perry D. Mathis*

(By) Deputy Clerk

*Y. Berry*



DATE

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER:

Abbe D. Lowell  
Chadbourn & Parke, LLP  
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Washington, D.C. 20036  
202-974-5600